

STATE OF MICHIGAN
COURT OF APPEALS

AKEBIA HERRY,

Plaintiff-Appellee,

v

SUBURBAN MOBILITY AUTHORITY FOR
REGIONAL TRANSPORTATION a/k/a SMART,

Defendant,

and

DOLLIE MAE HILBERT,

Appellant.

UNPUBLISHED

May 15, 2012

No. 303120

Wayne Circuit Court

LC No. 09-026654-NI

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant, Dollie Mae Hilbert, appeals as of right the trial court order denying her motion for summary disposition premised on governmental immunity. We affirm.

The lower court's decision regarding a motion for summary disposition is reviewed de novo with the evidence examined in the light most favorable to the nonmoving party. *In re Egbert R Smith Trust*, 480 Mich 19, 23-24; 745 NW2d 754 (2008). A motion brought pursuant to MCR 2.116(C)(7) alleges that a claim is barred because of immunity by law. *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 264; 792 NW2d 781 (2010). "The availability of governmental immunity presents a question of law[.]" *Norris v City of Lincoln Park Police Officers*, 292 Mich App 574, 578; 808 NW2d 578 (2011). To determine whether summary disposition is appropriate pursuant to MCR 2.116(C)(7), a court must examine all documentary evidence submitted by the parties and accept as true the allegations in the complaint unless affidavits or other documentation contradicts them. *Blue Harvest, Inc v Dep't of Treasury*, 288 Mich App 267, 271; 792 NW2d 798 (2010). If material facts are not in dispute or if reasonable minds could not differ regarding the legal effect of the facts, the application of governmental immunity is resolved as an issue of law. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). However, summary disposition is precluded when reasonable jurors could honestly reach different conclusions with respect to whether a

defendant's conduct rises to the level of gross negligence. *Chelsea Investment Group*, 288 Mich App at 264-265.

Affidavits and other documentary evidence offered in support of and in opposition to a dispositive motion shall only be considered to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). When ruling on a motion for summary disposition, the court does not assess the credibility of the witnesses. *White v Taylor Distrib Co*, 482 Mich 136, 142; 753 NW2d 591 (2008). "Summary disposition is suspect where motive and intent are at issue or where the credibility of a witness is crucial." *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). When the truth of a material factual assertion made by a moving party is contingent upon credibility, summary disposition should not be granted. *Id.* The trial court may not make factual findings or weigh credibility when deciding a motion for summary disposition. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). When the evidence conflicts, summary disposition is improper. *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003). Inconsistencies in statements given by witnesses cannot be ignored. *White*, 482 Mich at 142-143. Application of disputed facts to the law present proper questions for the jury or trier of fact. *Id.* at 143.

The governmental tort liability act, MCL 691.1401 *et seq.*, provides immunity from tort liability to governmental employees if the employees conduct does not amount to gross negligence. *Stanton v City of Battle Creek*, 466 Mich 611, 614-615; 647 NW2d 508 (2002). "Gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether injury results." MCL 691.1407(7)(a).

In the present case, there is a factual dispute underlying the determination regarding gross negligence. Defendant opined that the vehicle that she rear ended made a quick stop instead of proceeding through a yellow traffic light. However, plaintiff testified that the vehicle was stopped at a red traffic signal at the time of the collision. Because the evidence conflicts¹ and is contingent on the assessment of the credibility of the witnesses, the trial court properly denied the motion for summary disposition. *Foreman*, 266 Mich App at 135-136; *Lysogorski*, 256 Mich App at 299.

¹ We note that defendant made blanket assertions that this accident was "minor" and described the damages to the vehicle and bus. However, this narrative statement was not supported by documentary evidence. *Maiden*, 461 Mich at 120-121. Also, on appeal, defendant, for the first time, challenges the admissibility of evidence submitted with plaintiff's answer to defendant's motion for summary disposition. This contention is not preserved for appellate review because it was not raised, addressed, and decided in the trial court. *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328, 330 n 1; 802 NW2d 353 (2010). Therefore, we do not address it and limited our review to the deposition testimony submitted by the parties.

Affirmed.

/s/ Deborah A. Servitto

/s/ Mark J. Cavanagh

/s/ Karen M. Fort Hood